United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2098
75-2104

ORIGINAL

To be argued by
JOEL BERGER

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES RHEM, et al.,

Plaintiffs-Appellees,

-against-

BENJAMIN J. MALCOLM, et al.,

Defendants-Appellants.: Nos. 75-2098
75-2104

JAMES BENJAMIN, et al.,

Plaintiffs-Appellees

-against-

BENJAMIN J. MALCOLM, et al.,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-APPELLEES

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QUESTIONS PRESENTED

1) Whether the District Court erred in enjoining defendants from subjecting HDM detainees to previously invalidated non-contact booth visits.

2) Whether the District Court erred in enjoining defendants from continuing the previously invalidated practice of forcing a detainee to leave his cell and mingle with other prisoners during lock-out periods at HDM.

STATEMENT OF THE CASE

This is a consolidated appeal from (1) an amended judgment of the United States District Court for the Southern District of New York (Lasker, J.) in Rhem v. Malcolm, entered on April 23, 1975, enjoining appellants from confining members of the plaintiff class, all unconvicted pre-trial detainees formerly detained at the Manhattan House of Detention for Men (the "Tombs"), at the New York City House of Detention for Men on Rikers Island ("HDM") except under certain constitutionally required conditions detailed in the judgment; and (2) an order of the same District Court in Benjamin v. Malcolm, entered on July 11, 1975, granting a preliminary injunction according essentially the same relief to a plaintiff class consisting of all pre-trial detainees at HDM.

A. Rhem v. Malcolm

The Rhem case is a civil rights class action under 42 U.S.C. §1983, commenced in 1970, which challenged the constitutionality of conditions under which pre-trial detainees were confined at the Tombs. A lengthy trial was conducted in November of 1972 and January of 1973. On January 7, 1974, the District Court (Lasker, J.) ruled that several conditions and practices to which plaintiffs

were subjected violated the Constitution (R60a-R157a,* reported at 371 F.Supp. 594). Specifically, the Court held that plaintiffs' constitutional rights were being violated by denial of contact visits (R71a-84a, R119a, R129a-133a); denial of the right to remain in one's cell during "lockout" periods (hereinafter referred to as "optional lock-in") (R103a-105a, R121a, R136a); excessive confinement (R69a-71a, R120a-121a, R128a); limited visiting hours (R84a-87a, R119a, R131a); limited opportunity for physical exercise (R95a-97a, R120a, R133a-134a); restrictive mail procedures (R117a-118a, R122a, R150a-153a); arbitrary disciplinary procedures (R109a-110a, R121a, R138a-149a); mistreatment by guards (R106a-109a, R121a, R136a-138a); and inadequate ventilation, excessive noise and absence of transparent windows (R87a-95a, R120a, R134-136a).

In an order entered on March 22, 1974, Judge Lasker required defendants to submit a plan to correct these conditions and practices (R160a). The city, after filing various submissions which the Court found unresponsive to to the order (R171a-172a), flatly refused to submit the

* Numbers in parentheses preceded by "R" refer to pages of the Appendix of defendants' prior appeal to this Court in Rhem (No. 74-2072), incorporated with the Appendix of this appeal by order of this Court dated September 22, 1975 (Mansfield, J.).

required plan (R172-173a, R175a). Accordingly, the Court on July 11, 1974 enjoined defendants from further confining any detainees in the Tombs after August 10, 1974, subject to reconsideration if defendants were to submit the plan (R166a-191a, reported at 377 F.Supp. 995). This order was appealed to this Court,* which on November 8, 1974 affirmed Judge Lasker's findings of fact and conclusions of law and remanded for further consideration concerning remedy (507 F.2d 333).**

After this Court's affirmance, the city unilaterally chose to close the Tombs and transfer its detainees to HDM. The detainees so transferred thereupon requested Judge Lasker to accord them the same relief with respect to contact visits, optional lock-in, recreation, lock-in time, visiting schedule, correspondence and disciplinary proceedures as they would have been entitled to receive at the Tombs. Accordingly, the District Court held a relief hearing on January 10, 13, 21 and 30, 1975, to determine the precise measure of relief applicable to HDM (1-432).*** The hearing did not, however, deal with

* A stay was in effect for the pendency of the appeal (R211a-212a).

** The only findings and conclusions not affirmed dealt with correspondence and disciplinary procedures, which were the subject of a separate order not before this Court on the prior appeal. 507 F.2d at 339, n.12.

*** Numbers in parentheses not preceeded by "R" refer to pages of the Joint Appendix of the instant appeal. The pagination of this Joint Appendix runs 1a-202a, and then begins anew 1-601.

the issue of contact visits, since defendants agreed at the outset to establish a contact visiting program at HDM (26a; 11). Judge Lasker also personally toured HDM (18a).

In a memorandum and judgment dated February 20, 1975* the Court established minimal constitutional standards for the incarceration of plaintiffs at HDM with respect to contact visits (26a,37a), optional lock-in (21a-22a, 36a-37a), lock-in time (21a-22a, 35a-36a), recreation (30a-32a, 37a-38a), discipline (38a) and correspondence (38a). The Court declined to order an expansion of the HDM visiting schedule (26a-30a) and to grant other measures of relief on issues not originally litigated in the case (25a-26a).

In an amended judgment of April 23, 1975 (78a-83a),** accompanied by a memorandum (63a-77a), Judge Lasker modified the relief granted in several respects. The amended judgment also in essense sanctioned the existing lock-in schedule at HDM (69a-71a).***

Both sides filed notices of appeal. Plaintiffs also filed a motion in the District Court to re-open the proceedings and present additional evidence with respect to

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* 15a-38a; Memorandum reported at 389 F.Supp. 964.

** The February 20th judgment was stayed pending consideration of motions for amendment by both parties.

*** Compare Amended Judgment of April 23, 1975 (79a-80a) with lock-in schedule described by Warden of HDM at relief hearing (119-35).

HDM's visiting schedule and lock-in schedule (84a-118a). On June 26, 1975 Judge Lasker denied the motion, noting that Rhem had already been in litigation for over four years, but stated that his determination on those issues was without prejudice to reconsideration in a plenary lawsuit on behalf of all detainees of HDM (121a-125a). Plaintiffs then withdrew their notice of appeal, leaving only defendants' appeal from the amended judgment of April 23, 1975 before this Court.

B. Benjamin v. Malcolm

Benjamin is a civil rights class action on behalf of all detainees held at HDM. The complaint, filed on June 24, 1975, alleges conditions and practices essentially similar to those invalidated at the Tombs in Rhem (476-494). In a motion filed the same date as the complaint, plaintiffs alleged that the city had narrowly applied Judge Lasker's amended judgment of April 23, 1975 in Rhem solely to the remaining Tombs transferees at HDM, and were denying the rights established under that judgment to all other detainees within the institution. Plaintiffs sought a preliminary injunction according them the same rights granted to Tombs transferees at HDM under the April

23rd judgment (495-501).*

In a memorandum and order dated July 11, 1975 (584-601), the District Court granted the preliminary relief requested with respect to contact visits, optional lock-in, correspondence** and disciplinary proceedures. The Court based its determination upon the record of the relief hearing and other prior proceedings in Rhem (596-97). The Court also cited to a recent report of the New York City Board of Correction describing the situation at HDM as ". . .critical and deteriorating. . . [and] the most serious and potentially explosive prison atmosphere to exist in New York City in recent years" (596).***

Plaintiffs' motion for preliminary relief also alleged that an expansion of the HDM weekend visiting schedule, promised by defendants the previous January (376-77, 402-05) and relied upon by Judge Lasker in denying any further

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* Plaintiffs also alleged that defendants had presented "waiver" forms to the Tombs transferees, by which they would relinquish their rights under the April 23rd judgment (503, 503(i), 503a). The Court initially declined to take action with regard to this allegation (601). However in a subsequent order in Rhem, entered on August 14, 1975 and not appealed by defendants, Judge Lasker invalidated all waivers that had been signed and enjoined defendants from soliciting them anew.

** On one correspondence issue, the right to receive books and publications from sources other than a publisher, the Court initially denied relief (588) but upon reconsideration granted the relief requested in an order entered on August 14, 1975. The city has not appealed from that order.

*** The Board's report was filed with the Court and is reproduced in its entirety in the Appendix (531-577).

relief on visiting schedules in Rhem (27a), had never been implemented by defendants (503a). The city promised that the schedule change would finally begin on July 12, 1975, and the Court accordingly declined to enter an order on this issue (588).

Finally, the Court denied plaintiffs' request for preliminary relief on the issue of recreation, based upon defendants' representation that they were already according plaintiffs recreation periods substantially similar to those ordered in Rhem (588). However, the following month the Court found that plaintiffs were in fact not receiving that degree of recreation (Minutes of August 12, 1975, pp.12-13), and by an order entered on August 14, 1975, required defendants to increase the recreation hours at HDM. The city has not appealed from that order.

The District Court granted defendants a stay pending oral argument of their appeal from all relief granted in the preliminary injunction of July 11, 1975 (588-89).*

By order of August 4, 1975, this Court granted defendants' motion to consolidate the appeals in Rhem and Benjamin (Van Graafeiland, J.).

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* The city did not seek a stay pending appeal of the April 23, 1975 judgment in Rhem.

Since defendants did not challenge the provisions of the Benjamin order relating to correspondence and discipline in their brief to this Court, the stay as to those issues has been vacated upon their consent by order of the District Court entered September 24, 1975.

STATEMENT OF FACTS

On this appeal defendants are challenging only two provisions of the relief accorded by Judge Lasker, regarding contact visits and optional lock-in. Accordingly, appellees' statement of facts will be limited to a description of the record on those two issues. Since the District Court's determinations are based to a considerable extent upon its original findings of fact in Rhem, we shall summarize briefly the original trial record as well as the subsequent proceedings on both issues.

A. Contact Visits

1. Rhem: The Original Trial Record

In his initial Rhem opinion, Judge Lasker made the following finding of fact which was later affirmed on appeal by this Court:

> Booth visiting arrangements at MHD are frustrating and degrading to inmates and their visitors at MHD (R119a).

Defendants' visiting booths are small cubicles no larger than a telephone booth (R430a). The detainee is separated from his visitor by a steel wall and a small pane of bullet-proof glass, and voice communication is by telephone only (72a). Photographs of the booths were placed in evidence at trial and are reproduced in the Appendix of the city's prior appeal (R619a, 621a).

Summarizing the trial testimony, the District Court observed: ". . .all the witnesses agreed that booth visits were painful and psychologically harmful to inmates. . ." (R79a). Dr. Karl Menninger found the non-contact booths "the most unpleasant and most disturbing detail in the whole prison," and deplored them as a "violation of ordinary principles of humanity" (R437a). He stated that non-contact visiting takes away "what little decency and humanity there is in the care of the prisoner" (R462a).

The warden of the Federal Detention Center testified that

> it is unbearable for me to go to a visiting room and see a wife talk to her husband through the telephone. To our way of thinking, that has gone out a number of years ago (R595a-596a).

Similarly, Dr. Menninger stated that upon observing booth visits,

> . . .it's such a painful sight that I don't stay but a minute or two as a rule. It's a painful thing. . .I feel so sorry for them, so ashamed of myself that I get out of the room (R476a).

Dr. Menninger testified that the non-contact visiting facilities at the Tombs had seriously damaging psychological consequences (R461a-462a). He stated that for a detainee in new surroundings, experiencing the stress of incarceration,

> . . .the most positive experience. . .is going to be the reestablishment of a feeling of contact, of closeness with somebody

> who has enough love for him to come clear in there to see him. . . [T]he one great thing that he can look forward to is the reestablishment, contact, with this world. Because everybody lives constantly with a lot of contacts established, with you, them, with the judge, with the grocer and so forth. These have all been broken for this man.
>
> Now this makes for a dangerous state of instability, because without these contacts he can't live psychologically. . . . He looks forward to this experience of saying a few words, touching her hand -- well, in this instance you don't get to touch her hand, but touch his hand, see a smile, see the wrinkles in his face, you might say. It's the whole contact with another human being, familiar human being, a known human being (R440a-441a).

Dr. Menninger described the deep roots of this basic human need:

> It means a great deal to babies, you know, to be touched by the mother and most people all their lives retain that -- it's one of the most important assurances, you know, that there are other human beings in the world. . . . Contact is important. I mean, tactile assurance that there's a real world around me, a human world. . ." (R450a-451a).

Standing against the need for contact is the actual experience of a booth visit:

> A person goes in and shouts and the poor visitor stands up on his or her tiptoes and tries to see him. And he shouts and after a certain amount of frantic effort to establish a piece of communication, they just give it up. . . . [I]t breaks that very important human lifeline of contact. . . (R442a).

Thus, non-contact visiting booths offer only the appearance of a visit while withholding its substantive content. Dr. Augustus Kinzel, former staff psychiatrist at the United States Medical Center in Springfield, Missouri, analogized this visiting arrangement to "the carrot on the stick that is held in front of the person who can't quite attain it" (R312a). Dr. Menninger said it was like "dangling a fragment of meat in front of a dog and jerking it away" (R443a).

Dr. Stephen Teich, the Chief Psychiatrist at the Tombs, described one case history that supported vividly the testimony of Drs. Menninger and Kinzel. The detainee was particularly close to his family, and his alleged crime had been motivated by the trouble he'd been having supporting his family. He had resisted transfer to the Rikers Island Hospital because it would be difficult for his wife to visit him there. Yet every time his wife came to see him at the Tombs, "he would go down to the booths and come up even worse than when he went down because of the separation" (R342a).

Dr. Menninger also found that the booths are degrading to the detainees:

> Take a man who has not been arrested before. He comes in here and says, "My gosh, I'm in the clink now, what will happen? My friends will avoid me and everything else." Now, it's quite a

> sensation when one of them comes to see you. And they have these curious artificial gadgets imposed to the establishment of a normal human life. If between me and the judge there were suddenly erected a barrier of that kind, what would he think? What would I think? What would everybody think? My goodness, am I a leper, am I -- what am I? Do you have to have all this protection? (R444a)

Indeed, former New York City Correction Commissioner George F. McGrath conceded that he had opposed permitting children to visit because he believed it would be harmful for a child to see his father in the booths. Deposition, Plaintiffs' Exhibit 37 of the trial, pp.192-93.

Contact visits were advocated not only by Drs. Menninger, Kinzel and Teich, but by several correctional experts including Donald Goff, former General Secretary of the Correctional Association of New York and former Chief of the New Jersey Bureau of Correction (R379a, 381a), and Professor H.H.A. Cooper of N.Y.U. Law School (a defense witness) (R610a). Even defendants' Director of Operations, Mr. Joseph D'Elia, conceded that contact visiting might reduce tension and anxiety and thus have a positive effect upon security (R568a-569a).

Plaintiffs introduced a report of the New York State Senate Committee on Crime and Correction, issued five years ago (shortly after the 1970 Tombs riots), advocating contact

visits (Plaintiffs' Exhibit 18, p.38).*

Plaintiffs established that at the new Federal Detention Center adjacent to the Foley Square Courthouse, then under construction and now in operation, there would be no booths and every visit would be a contact visit (R598a). And plaintiffs introduced at trial a May, 1972 Administrative Bulletin of Russell G. Oswald, then New York State Commissioner of Correctional Services, requiring the dismantling of all visiting barriers at all state correctional institutions. Plaintiffs' Exhibit 25, pp.2,3.

The District Court's initial Rhem opinion of January 7, 1974 contains a detailed description of the original trial record on contact visiting (R71a-84a).

2. Rhem: The Relief Proceedings

Following this Court's affirmance, defendants at first continued to resist implementation of contact visiting. In an offer of proof filed on December 20, 1974, they stated: ". . .it will be shown that for a variety of reasons, contact visits, in the context of NYCHDM, will not take on the importance the District Court attached

* Over a year ago a report of the New York City Board of Correction, submitted to the District Court and to this Court at oral argument of the prior appeal, urged that plans for contact visiting be prepared for both the Tombs and Rikers Island. Report on the Future of the Manhattan House of Detention 31-33, 38-39 (August 1974).

to this feature upon its review of conditions at the Manhattan House of Detention for Men" (10a). In a conference held the same day, counsel for defendants elaborated upon the city's position:

> MR. TOBIAS: With respect to the implementation of contact visits we maintain that there are differences in the visitation booths existing at the House of Detention for Men on Riker's Island vis-a-vis the visiting booth that you saw when you conducted the trial originally a few years ago.
>
> THE COURT: What difference in the booths are there? Can you touch your visitor?
>
> MR. TOBIAS: No.
>
> THE COURT: What difference is there?
>
> MR. TOBIAS: The fact that the visits are conducted in an orderly manner. They are not conducted in an atmosphere of mayhem --
>
> THE COURT: I don't understand that.
>
> MR. TOBIAS: In your decision it was specified that visits at the Tombs were in effect because of the surroundings, the glass was dirty, there was noise.
>
> THE COURT: Come on. Those were things that I mentioned in passing. But do you think that was important when I said you ought to be able to touch a wife's hand and kiss a child, and so forth?
>
> MR. TOBIAS: That is obviously another element (174a-175a).

However, the city abandoned its resistance shortly thereafter. Counsel for defendants, in his opening statement

at the January, 1975 relief hearing, informed the Court that

> . . .within 90 days the defendants will submit a plan to this Court which will allow the implementation of a program of contact visits to those inmates who do not present a threat to the good safety and order of the institution (11).

Accordingly, during the 4-day relief hearing the city, while vigorously opposing implementation at HDM on several other issues, did not present any evidence concerning contact visits. The only testimony on visiting adduced at the hearing concerned plaintiffs' request for an expansion of the visiting schedule at HDM. And in summation at the close of the relief hearing, defendants' only mention of contact visiting was a request that the Court not grant plaintiffs' proposal of a 60-day implementation deadline (348-49).

In his memorandum of February 20, 1975, Judge Lasker stated:

> The City offered no evidence that contact visits, ordered at the Tombs, are not feasible at HDM. Indeed, it now agrees to establish a program for contact visits (26a).

And the Court's judgment, entered the same day, provided:

> 4. Contact Visits
>
> (a) Within ninety days of the entry of this judgment all personal visits accorded plaintiffs shall be contact visits.

> (b) Defendants, upon establishing the classification system referred to in Paragraph 1 of this order,* may apply to the court for permission to deny contact visits to selected detainees in instances where defendants can establish, based upon said classification system, that contact visits would jeopardize institutional security (37a).

Nonetheless, in an affidavit in support of a motion to amend, filed on March 3, 1975, defendant Malcolm took issue with this provision of the judgment:

> The defendants have stated that due to the particular suitability and location of HDM, the defendants shall offer to the Court a program calling for the implementation of contact visits. Since the defendants are not, as yet, in a position to evaluate the effects of this new program, it is impossible to tell at this point whether the proposed contact visitation program can be effective for each personal visit. Thus, the defendants respectfully request that this Court not direct that all personal visits be contact visits (53a).

At oral argument of the motion, counsel for defendants informed the Court that the city's contact visit plan for HDM would not be submitted for at least another 90 days (460-61). He then elaborated upon defendant Malcolm's statement, explaining that the city feared an increase in the volume of visiting once contact visits began (464-65).**

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* Paragraph one required establishment of a classification system within ninety days (35a).

** At the relief hearing plaintiffs had demonstrated, in support of their request for more flexible visiting hours, that the volume of visiting at HDM was only about 50% of what it had been at the Tombs (334-35).

Since the hearing HDM's visiting capacity has increased due to the closing of another institution with which HDM previously had to share its visiting facility (19, 534).

The Court responded:

> I think the proper way to approach it is for you to come back, in the event that threat occurs, and ask to be relieved of your obligations, rather than to be protected in advance. This one subject is one that I think is clear-cut and has gone on forever and means very, very much to prisoners (465).

The Court's amended judgment of April 23, 1975 once again required that all visits be contact visits, within 90 days of entry of that judgment (81a).* In his memorandum in support of the judgment, Judge Lasker observed:

> Four years after the commencement of this litigation, more than a year after the post-trial opinion requiring the City to provide a plan for contact visiting, and months after the Court of Appeals' affirmance of that decision, defendants suggest that we eliminate our requirement that a contact visiting program be implemented in 90 days. At this late date, they continue to suggest that they be permitted to submit a program for contact visiting and that they be permitted to continue the use of the present glass walled visiting booths "in conjunction with the contact visit facilities to be constructed." We emphatically decline to grant the relief requested. We have been advised in open court on numberless occasions by the City's counsel that the City "had a plan" for contact visits, that the City "would present a plan" for contact visits or that the City was "in the process of preparing a plan" for contact visits.

* The District Court's only modification of the February 20th judgment on contact visiting was to eliminate the requirement that defendants apply to the Court for permission in instances where detainees are denied contact visits on security grounds (74a, 82a).

> Yet to this day the City has not submitted the most tentative of suggestions as to the implementation of this key issue. We have at all times throughout this litigation indicated our willingness to allow the City a reasonable period of time to make the changeover to contact visiting. The 90 day allowance provided in our judgment of February 20th, the effect of which has been stayed to this moment, when added to the period since January of 1974, during which the City has been on notice and when considered in the light of the Court of Appeals' observation, 507 F.2d 333, 339, that:
>
> > "If the handwriting was not yet clearly on the wall, it was at least more than barely legible to an interested reader. The City's claim that overall it did not have enough time to submit its plan is not persuasive."
>
> adds up to a sorry history which cannot conceivably be prolonged (73a-74a).

3. Benjamin

In their motion papers seeking preliminary relief in Benjamin, plaintiffs alleged that defendants had chosen to apply the April 23rd judgment in the narrowest literal sense by implementing contact visits on schedule for only the few remaining Tombs transferees at HDM (495-501). Defendant Malcolm, in his affidavit opposing the motion, conceded the truth of this allegation. Stating that "[t]he department is presently in the process of constructing for use by non-[Rhem] class members a contact visitation

facility" (580a), he informed the Court that:

> 9(c). Contact visits for the Rhem class of inmates will commence on or before the date established in the April 23, 1975 judgment [July 23, 1975]. Contact visits for the rest of HDM population must await the completion of the required construction (582).

Defendants did not renew their prior request that not every visit be a contact visit, nor did they submit any plan detailing the contact visit program envisioned by them for HDM.

The Court's Benjamin order, entered on July 11, 1975, did not set a specific date for defendants to begin according contact visits to the plaintiff class. Instead, Judge Lasker required:

> 1. Contact Visits
>
> (a) Commencing July 23, 1975, the defendants shall forthwith take all practical steps necessary to provide facilities for contact visits to all class members, and all personal visits to class members shall be contact visits as soon as such facilities have been provided.
>
> (b) Defendants, upon establishing a classification system, may deny contact visits to selected detainees in instances where defendants can establish, based upon said classification system, that contact visits would jeopardize institutional security (585).

As previously noted, Judge Lasker granted a stay of this provision pending oral argument of defendants' appeal to this Court (588-89).

B. Optional Lock-in

1. Rhem: The Original Trial Record

Considerable testimony was adduced at the original trial on the issue of affording plaintiffs the opportunity of remaining in the privacy of their cells during lock-out periods. Judge Lasker summarized the record as follows:

> Witnesses testified that even a sick detainee is rarely permitted to remain in his cell during lock-out (Transcript 803-08). Detainees are not permitted to clean their cells during lock-out even though cleaning materials are most easily available at that time (Transcript 53-5). Dr. Teich testified that he himself has had difficulty in securing permission for a detainee to remain in his cell for an interview with the doctor or a member of his staff (Transcript 541).
>
> [William] vanden Heuvel [then Chairman of the N.Y.C. Board of Correction] recommended allowing detainees optional lock-in during the lock-out period:
>
> > ". . .so that they can have an opportunity to read or to study or to work or to be by themselves if they want to be. It's not very much to give a person, but to the extent we can give it, we ought to." (Transcript 1024)
>
> He also saw it as an advantage that a detainee locked in would be free of assault (R104a).

Judge Lasker also described the defense testimony against optional lock-in, which was based primarily on the

fear that some detainees might seek to commit suicide during this form of lock-in (R104a-105a).

Based upon the testimony at trial, the District Court found that:

> The mental health of detainees would be promoted and tensions at MHD reduced if detainees were given the option of remaining in their cells in the lock-out period. The granting of such an option, with cell doors locked during the lock-out period, would not jeopardize the security of the institution (R121a).

The Court held that affording a detainee the option of remaining in the privacy of his cell, apart from other inmates, was constitutionally required (R136a). However, in deference to the objections raised by defendants, Judge Lasker stated that he would not grant relief on this issue until completion of a classification study then in progress by defendants, designed in part to identify potential suicides (R105a).

2. Rhem: The Relief Proceedings

At the January, 1975 relief hearing defendants abandoned their previous line of defense concerning potential suicides, and indeed stated that classification was irrelevant to the issue (136). HDM detainees are now afforded optional lock-in during the 6-9:30 P.M. lock-out period daily,

and during the morning and afternoon lock-out periods on week-ends. However, all detainees are forced to leave their cells during the daytime lock-out periods on week-days (119, 135).

At the hearing two detainees testified to the importance of optional lock-in. Mr. Rufus Hawk, age 40 (274), stated that he sometimes became groggy from medication he was receiving for a nerve condition (275-76). Although the doctor told him to lie down whenever this happened, the officer on his block required him to leave his cell during lock-out (277). Mr. Hawk also reads a great deal (275), and stated that it sometimes was not possible to read in the day room on his block because it is noisy there (276,283-84). He often took advantage of the optional lock-in periods which do exist at HDM to "have a little privacy. . .and lay down or read" (274).

Detainee James Benjamin similarly testified that "locking in the cell affords me an opportunity to lay down and read, which I am not able to do if I am locked out" (255). He added that there are not many benches or seats outside of the cells where one can read or write (255-256).

The city's defense against optional lock-in was based purely on considerations of administrative convenience.

James A. Thomas, then Warden of HDM, testified that during weekday program periods it was more difficult for the officers to go up on the tiers and get detainees from their cells for visits (136-37). He stated that this problem was more acute at HDM than at the Tombs because of HDM's large, lateral structure (137). Judge Lasker noted, however, that defendants at the original trial had frequently complained of similar logistical problems in the vertical structure of the Tombs, because of the inadequacy of the elevators (137, 143).

In order to gather additional information on optional lock-in as well as other issues, Judge Lasker reconvened the relief hearing on his own initiative several days after it had concluded (368). At this time, he asked Warden Thomas to explain further why optional lock-in was not permitted during all lock-out hours at HDM. When the Warden spoke of the difficulty of escorting detainees to the visiting area (390-91), the Court asked:

> THE COURT: So really what you are saying. . . is that it takes longer to find a man and put him in presentable condition for a visit if he is locked in his cell than if he is at the art class or gym or whatever?
>
> THE WITNESS: Well, no, what I am saying, the same thing holds true for any of these things (391).

Judge Lasker clarified the matter still further a few moments later:

> [THE COURT] Let me be sure I understand.

Let's suppose that three women come to visit at the same time.

THE WITNESS: Right.

THE COURT: And the husband of one is at the art class, and the husband of another is in the gym --

THE WITNESS: Right.

THE COURT: And the husband of a third, under the assumptions we are making, is locked in his cell.

THE WITNESS: Right.

THE COURT: In your opinion, would there be any appreciable greater time required for the correction officer who goes to get the man locked in his cell than the other two men?

THE WITNESS: No, but it would be added because you might find, from taking your example, you might find two locked in the cell in 6, you might find two in 4-block, 5-block, and like that.

THE COURT: Sure.

THE WITNESS: Now the accumulation --

THE COURT: Usually don't you send correction officers one by one to get a man?

THE WITNESS: What I am saying to you, I only have two officers.

THE COURT: What I don't understand is this: Even if you only have two officers, how does it impose more of a burden to look for a man in that particular spot than in this particular spot? I mean a man might be almost in a lot of different places during the program time, isn't that right?

THE WITNESS: That's true.

> THE COURT: And nobody is absolutely sure in advance where he is in the sense that they have to look and see where he is.
>
> THE WITNESS: That is correct.
>
> THE COURT: All right, then I think we understand each other (392-94).

When the Warden complained that some detainees would utilize optional lock-in to avoid compliance with unpopular orders (e.g., reporting for a medical exam to determine one's fitness for transfer to Sing Sing) (391), the Court responded:

> I don't think it is inconsistent with an optional lock-in plan to require that at a certain time everybody stand outside his cell or whatever it is you'd like them to do in case somebody has to go to the doctor or this, that, and the other.
>
> I am not suggesting, and I don't understand the plaintiffs to suggest, and I want to be corrected if the plaintiffs do suggest, that anybody is to be permitted to avoid a legitimate order by saying "I'd like to lock myself in my cell."
>
> I don't see a problem there (392).

With respect to detainees who wish to be locked in but are in a program or awaiting admission to a program, also considered a problem by Warden Thomas (410-11), the Court added:

> As I see the request for lock-in, the only reasonable condition on which it could be granted would be if, in the event a man chose to be locked in, he

gave up the right to do anything else during that period of time (412).

The detainees, being aware that program hours are the same as lock-out hours in the morning and afternoon (Thomas, 419-20), would simply chose between one or the other.

The District Court, in its memorandum of February 20, 1975, made several findings of fact with respect to optional lock-in:

> The sole objection which the City posits to extending optional lock-in hours is that doing so will cause administrative difficulty. The City claims in particular that processing of visits will be significantly impeded if it becomes necessary for a correction officer to locate a detainee in his cell, should the detainee receive a visit during a period of optional lock-in. With due respect to the good judgment and sense of fairness with which the testimony of HDM's warden was imbued on other subjects, we find this argument unpersuasive and unsupported by the facts of record.
>
> The dispute as to further optional lock-in relates solely to the hours during which "activities" occur; that is, the times when men on a particular cell block have the choice of attending various activities including library use, commissary visits, physical recreation, etc. At the beginning of that period, a detainee who engages in an activity proceeds to its location; those who do not are locked out of their cells, and must remain within the cell block on the floor or tiers outside the cells or in the block's dayroom. Those who would prefer to remain in -- or return to -- their cells for reading, writing or simply to be alone, are not permitted to do so.
>
> We find nothing in the record to establish that should a detainee receive a visitor during an activity period, it would impede

> the processing of visits to any greater degree for a correctional officer to find the inmate in his cell than if the man were to be located in the public parts of the cell block or at a designated activity. While it is the prerogative of the administrator to determine how an optional lock-in should be implemented, there seems to be no dispute that whatever problem there might be in locating detainees for visits can be obviated by the simple device of requiring an inmate choosing lock-in to indicate the choice at the commencement of the activity period. He will, of course, thereby waive his right to attend an activity for that period, or to remain in the public parts of the cell block. However, his whereabouts will be as effectively known to the responsible correction officer as if he were at an activity or in the public sections of the cell block. The judgment below, therefore, orders the establishment of further optional lock-in on the conditions specified (23a-25a).

Nonetheless, in deference to defendants' strong views on the question, Judge Lasker did not order total implementation of optional lock-in at HDM. Instead, he required that within 60 days of entry of the judgment defendants were to permit optional lock-in during activity periods in only two blocks of HDM, to be chosen by the Warden. If after 30 days of implementation the Warden felt that implementation for all of HDM was not feasible or practical, he was to submit a written report to the Court stating the reasons for his conclusion. The Court, after obtaining a response from plaintiffs' attorneys, would then determine whether or not to implement further relief (36a-37a).

In their motion to amend, defendants asked the Court to eliminate the optional lock-in provisions of the judgment. The Court denied this request, finding that

> Nothing contained in the material presented by the defendants on this motion contains new evidence or establishes that the court has overlooked any of the evidence or arguments heretofore made on the subject (72a).

In response to defendants' concern that implementation for 30 days in only two blocks would arouse resentment in the other blocks at HDM, the Court amended the judgment to specify that defendants of course had the option of initiating the 30-day program institution-wide (72a, 80a-81a).

3. Benjamin

In their papers opposing preliminary relief in Benjamin, defendants conceded that they were implementing optional lock-in during all lock-out periods only for Tombs transferees at HDM and not for the remainder of the HDM population (579-81).

Plaintiffs submitted to the Court the Board of Correction Report on HDM, which indicated that as a result of increased tension at the institution inmate assaults on other inmates had risen 43% over the previous year (532, 543). At the original Rhem trial, former Board Chairman William vanden Heuvel had noted that optional lock-in was one means whereby a detainee could be protected against assault (R104a).

The Court's order in Benjamin provided for optional lock-in on precisely the same terms as in the amended judgment in Rhem (585-87). In his memorandum accompanying the order, Judge Lasker stated:

> In Rhem, this court conducted evidentiary hearings as to lock-in conditions at HDM itself. The court heard the testimony of the Warden of HDM, who specified in detail the facts which the defendants claimed to support their position that the hours of optional lock-in should not be expanded. Neither defendants' affidavit nor their memorandum in opposition to the current motion make any offer of further proof on the subject. In any event the decree to be granted on this motion will not in any way exceed the parameters of the judgments rendered in Rhem on the basis of the evidentiary hearings (598-99).

The Court stayed the provisions of the Benjamin order concerning optional lock-in pending oral argument of defendants' appeal to this Court (588-89).

ARGUMENT

INTRODUCTION

In Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), this Court declared that

> The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail; and the same constitutional provisions prevent unjustifiable confinement of detainees under worse conditions than convicted prisoners. Id. at 336.

See also Hamilton v. Love, 328 F.Supp. 1182, 1192 (E.D. Ark. 1971) (". . .the conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty"), quoted with approval in Rhem v. Malcolm, supra, 507 F.2d at 337.

More recently, the Court reiterated this legal standard in Detainees of the Brooklyn House of Detention v. Malcolm, ____ F.2d ____, (Docket Nos. 74-2427, 74-2482, decided July 31, 1975):

> Pretrial detainees are no more than defendants waiting for trial, entitled to the presumption of innocence, a speedy trial and all the rights of bailees and other ordinary citizens except those necessary to assure their presence at trial and the security of the prison. In providing for their detention, correctional institutions must be more than mere depositories for human baggage and any deprivation or restriction of the detainees' rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity [citations omitted]. Slip op. at 5288.

On this appeal, defendants seek to avoid the application of these principles with respect to two constitutional rights already established in Rhem: the right to touch one's visitor, and the right to remain in the privacy of one's cell instead of being forced to mingle with other prisoners. In neither instance do defendants challenge the basic underlying legal right, nor do they contest any

of Judge Lasker's findings of fact in the relief proceedings as clearly erroneous. Instead, defendants seek to limit the relief accorded on both issues solely on grounds of administrative expediency.

Plaintiffs will demonstrate that defendants' appeal is totally devoid of any factual or legal basis constituting reversible error on either issue, and that Judge Lasker's Rhem judgment and Benjamin order should be affirmed in all respects.

POINT I

THE DISTRICT COURT PROPERLY ENJOINED DEFENDANTS FROM SUBJECTING HDM DETAINEES TO PREVIOUSLY INVALIDATED NON-CONTACT BOOTH VISITS.

In Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y. 1974), Judge Lasker found on the basis of an extensive trial record that non-contact booth visits are ". . .frustrating and degrading to inmates and their visitors." Id. at 621. He held that defendants were constitutionally required to convert to a contact visiting system, stating that to deny an unconvicted pre-trial detainee "the right to shake hands with a friend, to kiss a wife, or to fondle a child [is] inhumane and cruel in fact." Id. at 626. Judge Lasker quoted from the decision of another court which described non-contact visiting booths as:

> . . .an affront to the dignity of the prisoner as a man; they exceed the limits

> of standards of decency; and they are a shame to Philadelphia, as they would be a shame to any civilized community. Jackson v. Hendrick, 71-2437, Court of Common Pleas, Philadelphia County, Pa., April 7, 1972 at 225. Id. at 626.

The Court also held that subjecting unconvicted pre-trial detainees to non-contact visits deprived them of equal protection of the laws, since all visiting barriers have been eliminated in New York State's prisons for convicted felons. Id. at 625.

Responding to defendants' objection that elimination of the booths would cost money in order to renovate facilities and hire additional guards, the court below quoted from Mr. Justice (then Judge) Blackmun:

> [h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . . Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968). Id. at 626.

On appeal, this Court affirmed Judge Lasker's finding of fact that the booths are frustrating and degrading as well as his conclusion of law that their continued use is unconstitutional. Rhem v. Malcolm, 507 F.2d 333, 339 (2d Cir. 1974). In affirming, this Court noted that Judge Lasker had written "a thoroughly documented and persuasive opinion" (id. at 336), a characterization which applies with particular force to the lengthy and detailed sections of that opinion on the subject of contact visiting. 371 F.2d at 601-06, 625-26.

Despite this Court's prior affirmance in Rhem, appellants now ask this Court to hold that Judge Lasker erred by denying them the right to subject plaintiffs to non-contact booth visits at least some unspecified portion of the time. However, no authority is cited for the proposition that defendants may perpetuate in part a condition of pre-trial detention which has been found frustrating and degrading and therefore unconstitutional by a district court and affirmed as such on appeal. Indeed, in view of this Court's recent reaffirmation that detainees must be held under the least restrictive means necessary to insure their appearance at trial and preserve the security of the institution* [Detainees of the Brooklyn House of Detention v. Malcolm, supra, slip op. at 5288], such a proposition is clearly without legal basis.

Furthermore, defendants' position is in direct conflict with plaintiffs' right to equal protection of the laws. Since all visits for convicted felons in the New York State prison system are contact visits, defendants' proposal would result in "unjustifiable confinement of detainees under worse conditions than convicted prisoners." Rhem v. Malcolm, supra, 507 F.2d at 336.

* The defense that contact visits create security problems, ardently pressed by defendants at the original trial (see 371 F.Supp. at 604-06 and 625-26) and on the prior appeal (see 507 F.2d at 338), was totally abandoned in the proceedings which are the subject of this appeal.

Appellants also contend that Judge Lasker accorded plaintiffs relief on this issue precipitiously, without affording the city an opportunity to present evidence concerning the difficulty of providing contact visits. However, a brief review of the proceedings since this Court's prior affirmance will demonstrate that this contention is utterly false, and indeed has been invented by defendants for the first time on this appeal.

Defendants had every opportunity to present a defense as to the requisite degree of contact visiting during the relief hearing conducted by Judge Lasker in January of this year. Although they initially opposed any contact visiting at HDM (10a, 174a-75a), appellants reversed themselves at the outset of the hearing and announced that contact visiting would be instituted (11). They did not state at this time that their visitation plan would provide only a mixture of the previously invalidated booth visits with contact visits, nor did they introduce a shred of evidence during the four-day relief hearing in support of any such proposal. Indeed, as Judge Lasker later noted, defendants presented no testimony whatsoever on the subject of contact visits at the hearing (26a).

It was only after the hearing had concluded, in their motion to amend the District Court's judgment of February

20, 1975, that defendants asked for the first time in these proceedings that not every visit be a contact visit. And then the only statement offered in support of their request was speculation that contact visiting might lead to an increase in the number of visitors and thus overtax defendants' facilities (53a; 464-65). Again, no evidence was presented, nor was there any request to re-open the hearing to introduce any such evidence. Judge Lasker appropriately responded that he could not amend the judgment on the basis of such speculation, and that defendants were of course free to return to Court if the problem actually arose (465).

When the Benjamin case was filed in late June, defendants had another opportunity to advance the proposition that not every visit need be a contact visit. Defendants did not even raise the issue in their affidavit in opposition to plaintiffs' prayer for preliminary relief, and merely stated that they were "in the process of constructing" a contact visit facility (580).*

* In the face of this sworn representation, Judge Lasker did not order a specific implementation deadline and instead merely required defendants to proceed with their efforts (585). However, defendants' brief on appeal now informs us that funds for the construction were not even appropriated until August 28, 1975, nearly two months after defendant Malcolm's affidavit was submitted (Appellants' Brief, p.17).

Throughout these proceedings, the elusive contact visit "plan" repeatedly promised by defendants was never presented to Judge Lasker. Defendants first promised to submit such a plan within 90 days of the opening of the relief hearing on January 10, 1975 (11) But by April 23, 1975, the plan was still nowhere in sight. Judge Lasker noted in his memorandum of that date that it was already "[f]our years after the commencement of this litigation, more than a year after the post-trial opinion requiring the City to provide a plan for contact visiting, and months after the Court of Appeals' affirmance of that decision. . . ." (73a). He then stated:

> We have been advised in open court on numberless occasions by the City's counsel that the City "had a plan" for contact visits, that the City "would present a plan" for contact visits or that the City was "in the process or preparing a plan" for contact visits. Yet to this day the City has not submitted the most tentative of suggestions as to the implemenation of this key issue. We have at all times throughout this litigation indicated our willingness to allow the City a reasonable period of time to make the changeover to contact visiting. The 90 day allowance provided in our judgment of February 20th, the effect of which has been stayed to this moment, when added to the period since January of 1974, during which the City has been on notice and when considered in the light of the Court of Appeals' observation, 507 F.2d 333, 339, that:
>
> > "If the handwriting was not yet clearly on the wall, it was at least more than barely legible to an interested reader. The City's claim that

> overall it did not have enough time to submit its plan is not persuasive."
>
> adds up to a sorry history which cannot conceivably be prolonged (73a-74a).

But the sorry history was indeed prolonged. Defendants chose to forestall any comprehensive action on contact visiting still further by honoring the Rhem judgment only in the narrowest, literal sense, according contact visits to only the handful of Tombs transferees remaining at HDM on the implementation date (July 23, 1975) and denying than to all other detainees in the institution.* Even when the Benjamin case was filed to redress this situation, defendants failed to present the long overdue plan.

* It is safe to assume that Judge Lasker hardly intended to accord defendants an implementation deadline of three months -- actually five months from the date of the initial judgment -- merely to accord contact visits to the tiny number of Tombs transferees who would be left at HDM by July of 1975. Rather, there was a tacit assumption, recognized by defendants themselves in their brief, that the City could hardly "treat these two groups of inmates housed at the same facility any differently" (Appellants' Brief, p. 16, footnote). For this reason the Rhem relief proceedings always focused on defendants' problems in providing relief to the entire HDM population, not merely to a few Tombs transferees. And the Benjamin case was not even filed until it became apparent, several months later, that defendants were in fact treating the two groups very differently.

Defendants have quoted out of context a statement by the District Court that the Rhem proceedings did not finally adjudicate the rights of all HDM detainees (124a). As the Court later clarified in its Benjamin opinion (599) the statement meant only that neither party was precluded from offering relevant new evidence in a new lawsuit on behalf of all HDM detainees. It did not mean that defendants could simply ignore the obvious impact of the Rhem judgment with respect to the entire HDM population.

In the absence of the plan, the record provides no clue as to precisely how defendants would like to mix contact visits with the booth visits which have already been declared unconstitutional by the District Court and this Court. Defendants have for the first time conjured up some suggestions in their brief, such as the denial of contact visits for an undefined class of "short term" detainees (p.17) and denial of contact visits to "long term" detainees for some unspecified percentage of visits (p.18). But even these vague proposals were never submitted to Judge Lasker. And defendants have never sought to introduce any evidence as to how such proposals could conceivably be reconciled with the prior decision of the District Court, as affirmed, invalidating booth visits as frustrating and degrading and an unjustifiable deprivation of a right universally accorded to convicted prisoners in New York State. Yet defendants, having never even submitted a plan repeatedly promised to Judge Lasker since January, let alone any evidence as to how it might be constitutionally adequate, now accuse him of having ruled upon "an insufficient record," "without having a full hearing," and "without affording the City an opportunity to present all available statistics" (Appellants' Brief, pp. 15,17,18). In fact, appellants had every opportunity to present evidence and attempt to make a record in the District Court. They simply failed to do so.

What the record before this Court on the issue of contact visiting does reveal is a regrettable continuation by defendants of conduct which this Court strongly criticized in its prior Rhem opinion. At that time, faced with repeated delaying tactics by these same defendants concerning the submission of another long overdue plan [see Rhem v. Malcolm, 377 F.Supp. 995 (S.D.N.Y. 1974)], this Court stated:

> One does not get the impression from the record of defendants straining in every way to comply with the district court's directions. The foot dragging is, of course, understandable. The financial woes of the City of New York are obvious to all who live or work here, including federal judges. And on the agenda of City priorities, which includes supply of such essential services as police and fire protection, provision of welfare, care of the ill, collection of garbage, and maintenance of the transit system, it is not surprising that the housing of those confined in jail is not at the top of the list. But pre-trial detainees are people, not outcasts, who are presumed to be innocent of any crime and who have rights guaranteed by the Constitution, as do we all. When a district court is presented with a claim of violation of those rights, its proper function is to decide the case before it, whatever sympathy it may have for those who must manage a great metropolis beset by grievous problems. Nor can similar considerations deflect us from the issues on appeal. 507 F.2d at 341-42.

Only recently, the Court repeated this admonition despite the worsening of the City's financial situation. Affirming a District Court decision enjoining the city from confining two

detainees in tiny single-occupancy cells, the Court stated:

> . . .the City must act with reasonable promptness to provide facilities for pre-trial detainees consistent with their constitutional rights. Inaction of course will not be tolerated nor will the present conditions be condoned. Detainees of the Brooklyn House of Detention v. Malcolm, ____ F.2d ____, slip. op. at 5291 (Docket Nos. 74-2427, 74-2482, July 31, 1975).

It is true, as appellants note, that in both Rhem and Detainees of the Brooklyn House of Detention this Court remanded for further consideration as to remedy (Appellants' Brief, p.15). But here the District Court has already spent several months conducting relief proceedings, during which time defendants have offered virtually no evidence on the subject of contact visits. This Court should not reward defendants' delaying tactics by remanding for the presentation of further evidence which could have been introduced nine months ago, and which furthermore is of highly dubious relevance since booth visits have already been invalidated as frustrating and degrading and a denial of plaintiffs' right to equal protection vis-a-vis convicted prisoners. Judge Lasker's rulings on contact visits are solidly based upon the original Rhem opinion, as affirmed, and upon the record of the subsequent proceedings. They should be affirmed by this Court.

POINT II

THE DISTRICT COURT PROPERLY ENJOINED DEFENDANTS FROM CONTINUING THE PREVIOUSLY INVALIDATED PRACTICE OF FORCING A DETAINEE TO LEAVE HIS CELL AND MINGLE WITH OTHER PRISONERS DURING LOCK-OUT PERIODS AT HDM.

In Rhem v. Malcolm, supra, 371 F.Supp. 594 (S.D.N.Y. 1974), Judge Lasker held that since detainees must be held under the least restrictive means consonant with the purpose of their confinement, defendants could not force a detainee to leave his cell and mix with other prisoners during lock-out periods. Having found that permitting detainees the option of remaining in their cells during lock-out periods was important to their mental health and to the reduction of institutional tension (id. at 621), the Court stated:

> A plan for changing to an optional lock-out system will be provided in the decree, to assure, as the least restrictive alternative, that detainees are accorded, where possible, the "right to be left alone." (Brandeis, J., dissenting, in Olmstead v. United States, 277 U.S. 438, 478 (1928)). Id. at 628.

These findings of fact and conclusions of law were affirmed on appeal to this Court. Rhem v. Malcolm, supra, 507 F.2d 333, 339 (2d Cir. 1974).

Defendants' brief (pp.18-19) treats Judge Lasker's determinations on optional lock-in as if they were a reckless foray into the administrative routine of HDM, unauthorized

by any lawful mandate. In fact, however, the District Court was acting to implement a significant constitutional right already determined in the prior Rhem litigation.

Both the original Rhem record and the record of the more recent proceedings establish the significance of optional lock-in. A detainee forced to leave his cell cannot lie down if he feels ill. He cannot avoid a feared assault from another prisoner by remaining in the safety of his locked cell. And he cannot be alone to read or write, apart from the mass of humanity congregating in the jail's lock-out areas.* Thus, it is hardly surprising that some detainees would choose to be locked in the privacy and safety of their own cells rather than be forced into the lock-out area.

Defendants have repeated in their brief (pp.18-19) the same factual objections to optional lock-in, based on considerations of administrative convenience, which were presented to the District Court. However, these arguments were rejected by Judge Lasker's factual findings of February 20, 1975 (23a-25a), and defendants have not maintained that those findings are clearly erroneous. The District

* The Board of Correction's June, 1975 report concerning HDM noted that during lock out time ". . .a crowd of up to 150 inmates are milling around on the ground floor on each side of a cellblock. . ." (541). The Board further observed that some detainees actually prefer to be housed in punitive segregation because of its "less crowded and significantly quieter environment than. . .the general population cellblocks" (543).

Court found that the problem of locating a locked-in detainee for visits would not be great, since the detainee's whereabouts "will be as effectively known to the responsible officer as if he were at an activity or in the public sections of the cell block" (24a-25a). Furthermore, detainees who are in programs or awaiting imminent admission to programs will obviously have the opportunity to remain out of their cells during lock-out if they so choose (24a). Finally, as the Court noted at the relief hearing, a detainee who chooses to remain in his cell will not thereby be relieved of his obligation to comply with orders to go various places (e.g., to court or to the clinic) (392); and defendants have not demonstrated why it would be harder to enforce compliance with such an order if the detainee is alone in his cell rather than among a large group of prisoners in one of the general lock-out areas.

Thus, Judge Lasker's rulings regarding optional lock-in are based upon unassailable factual determinations. Far from constituting "unwarranted administrative interference" in the affairs of HDM (Appellants' Brief, p.19), they are designed to afford unconvicted citizens at least some small degree of privacy in pre-trial detention. A detainee who is ill, or who fears assault, or who merely wishes to lie down and read or write away from other inmates,

should not be prevented from doing so absent compelling security reasons to the contrary. To so hold is merely one more application of the constitutional principle established by this Court that detainees must be held under the least restrictive means necessary to accomplish the limited legal objective of pre-trial detention. Detainees of the Brooklyn House of Detention v. Malcolm, supra, slip. op. at 5288; Rhem v. Malcolm, supra, 507 F.2d at 336-37.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT AND ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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